IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 469

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

—against—

THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as Wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as Vestrymen of said Church, and JAMES PERNETTE DEWOLFE as Bishop of the Diocese of Long Island,

Respondents.

OBJECTIONS OF RESPONDENTS (OTHER THAN JAMES PERNETTE DE WOLFE) TO MOTION ON BEHALF OF SOME 2576 MEMBERS OF THE CLERGY OF VARIOUS RELIGIOUS DENOMINATIONS OF PROTESTANT CHURCHES IN THE UNITED STATES FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The motion is made under Rule 27, paragraph 9, subsections (b) and (c) of the Rules of this Court. Subsec-

tion (b) explicitly states: "Such motions are not favored".

The instant motion is particularly unworthy of consideration because it fails to comply with the requirements of the Rule under which it is made. It fails (1) to show that the applicants have any real "interest" in this controversy and (2) to "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties * * *" (Rule 27, par. 9(c)).

In entering judgment in favor of respondents the trial court held that the Canons of the Protestant Episcopal Church and of the Diocese of Long Island conferred jurisdiction upon the Bishop to dissolve the pastoral relations; that the Bishop's judgment was made final by the Canons; and that his judgment was binding upon the civil courts because the petitioners as members of the Protestant Episcopal Church in that Diocese had so agreed. See:

> *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U. S. 1, 16 (1929).

It is obvious therefore that the decision, resting as it does upon the canonical nature of the Protestant Episcopal Church, and more particularly upon the canons of the Episcopal Diocese of Long Island, can be of nothing more than academic interest to clergymen who are not members of that church, and can have no effect whatever upon their tenure.

Indeed at pages 2-3 of their motion, the moving parties assert

> "Because of the fact that most of the moving parties are members of religious organizations other than that of the Petitioners and are not bound by the canons of the

> Protestant Episcopal Church, their brief will present the constitutional question on a broader foundation than appropriate for the Petitioners."

Since the whole controversy below turned upon the construction and effect of those very canons, the statement just quoted indicates that these moving parties desire, under color of an *amici curiae* brief, to argue constitutional abstractions having no foundation in this record.

The contention that "the issuance of an injunction by the Trial Court to enforce an ecclesiastical judgment on the pain of imprisonment for contempt was a direct invasion by the civil authority of religious liberty guaranteed by [the First] Amendment" (Motion, p. 3), which the moving parties desire to brief as *amici curiae*, is the very same contention which the petitioners seek to present (Petition, p. 2). And there is no reason whatever shown in the motion for believing that this question will not be adequately presented by the petitioners in the event that their petition for writ of certiorari is granted.

The attorney for the moving parties, Mr. William Mason Smith, was attorney for the petitioners John Howard Melish and William Howard Melish, both in the trial court and in the Appellate Division (R. 70, 142, 144). After the Appellate Division had denied reargument and leave to appeal to the Court of Appeals (277 App. Div. 782), Mr. Smith was either relieved or withdrew as counsel for those petitioners, for he did not represent any of the petitioners in the Court of Appeals, all of whom were there represented by their present attorney Mr. Raphael H. Weissman (R. 575, 591).

As we have pointed out in our brief in opposition to the petition for certiorari (pp. 11-12), the petitioners Melish made the claim in the lower courts, not that the exercise

of jurisdiction by the trial court would be unconstitutional, but only that it would be premature. We submit that having left the case as attorney for the petitioners Melish, Mr. Smith should not be permitted to reenter it and argue, as attorney for *amici curiae,* a so-called "constitutional question" which he failed to raise below.

In the Appellate Division a brief *amici curiae* was filed by certain clergymen of the Protestant Episcopal Church, a number of whom are among those who now seek to file a brief *amici curiae* in this Court. Their attorney was Mr. Samuel Thorne. Neither these clergymen nor the rest of those who make the present motion filed any brief *amici curiae* in the Court of Appeals, nor did they make application for leave to file such a brief in that court.

Accordingly, we respectfully pray that the motion be denied.

Dated: January 24, 1951.

Respectfully submitted,

THEODORE KIENDL
WILLIAM R. MEAGHER
Attorneys for respondents other than James Pernette De Wolfe